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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

A.H. ROBINS COMPANY, INCORPORATED,
Petitioner,

v.

HONORABLE FRANK G. THEIS,
Judge of the United States District Court
for the District of Kansas,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

May a United States district judge rule on factual issues concerning which he has previously been a witness by giving an affidavit in a separate judicial proceeding?

PARTIES IN THE TENTH CIRCUIT

A.H. Robins Company, Incorporated*

The Honorable Frank G. Theis, United States District Judge For The District of Kansas

Note: The proceedings in the district court involved all cases pending in the *A.H. Robins "Dalkon Shield" IUD Products Liability Litigation*, MDL-211 (D. Kan.). The numerous plaintiffs, who are all individuals, were not specifically named in the papers in either the district court or the Tenth Circuit.

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* Pursuant to Rule 28.1, Petitioner A.H. Robins Company, Incorporated states that it has no parent or affiliated corporations other than wholly-owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES IN THE TENTH CIRCUIT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
(a) Summary	2
(b) The Role Of Judge Theis In The Dalkon Shield Multidistrict Litigation	3
(c) The Submission Of Judge Theis' Affidavit	4
(d) Plaintiffs' Motion For Discovery Sanctions	5
(e) The Public Nature Of Judge Theis' Affidavit	6
(f) A.H. Robins' Motion To Disqualify, And The Decisions Below	6
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	10
APPENDICES	
Appendix A—Order of the Tenth Circuit entered on March 15, 1985 denying the petition for mandamus	1a
Appendix B—Opinion and Order by the district court entered on February 1, 1985 denying the motion to disqualify	2a

TABLE OF CONTENTS—Continued

Page

Appendix C—Affidavit of Judge Theis dated July 3, 1984 ..... 20a

Appendix D—Motion by Plaintiffs for appointment of Special Masters to Supervise Document Discovery; for Supervised Videotape Depositions; and for Sanctions Against Defendant Robins; *In re A.H. Robins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation.* MDL No. 211 (D. Kan. filed Dec. 13, 1984) 25a

Appendix E—Excerpts from transcript of hearing in *In re Complaint of A.H. Robins Co., Inc.*, JCP No. 84-001 (8th Cir. Judicial Council, July 9, 1984) 32a

Appendix F—Excerpts from transcript of hearing in chambers in *In re A.H. Robins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation,* MDL No. 211 (D. Kan., July 20, 1984) 36a

TABLE OF AUTHORITIES

CASES — Page

A.H. Robins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation, 406 F. Supp. 540 (J.P.M.L. 1975) 3
Bell v. Chandler, 569 F.2d 556 (10th Cir. 1978) 9
Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) 8
Gardiner v. A.H. Robins Co., 747 F.2d 1180 (8th Cir. 1984) 2, 3, 4
Home Placement Service, Inc. v. Providence Journal Co., 739 F.2d 671 (1st Cir. 1984), *cert. denied*, 53 U.S.L.W. 3528 (Jan. 22, 1985) 8
In re Murchison, 349 U.S. 133 (1955) 8
Laird v. Tatum, 409 U.S. 824 (1972) 8
Mattox v. United States, 146 U.S. 140 (1892) 7
Meeropol v. Nizer, 429 U.S. 1337 (1977) 8
United States v. Grinnell Corp., 384 U.S. 563 (1966) 8
United States v. Will, 449 U.S. 200 (1980) 8

STATUTES

28 U.S.C. § 372(c) 2
28 U.S.C. § 372(c)(14)(A) 2, 4
28 U.S.C. § 455(a) 2, 6, 7
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332(a)(1) 3
28 U.S.C. § 1404 3
28 U.S.C. § 1407 3

RULES AND REGULATIONS

Fed. R. Civ. P. 37(b) 3
Supreme Court Rule 17.1(a) 7

CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES

Canon 3(A)(4) and (6) at 69 F.R.D. 275-76 (1975) 8

IN THE

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No.

A.H. ROBINS COMPANY, INCORPORATED,
Petitioner,

v.

HONORABLE FRANK G. THEIS,
Judge of the United States District Court
for the District of Kansas,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner A.H. Robins Company, Incorporated ("A.H. Robins") respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals.

OPINIONS BELOW

The Tenth Circuit did not issue an opinion. Its Order dated March 15, 1985, which has not been reported, is attached as Appendix ("App.") A. Judge Theis' Opinion and Order dated February 1, 1985 (App. B) denying A.H. Robins' motion to disqualify has not been reported.

JURISDICTION

A.H. Robins seeks review of an Order entered by the Tenth Circuit on March 15, 1985. A.H. Robins did not petition for rehearing.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 28 U.S.C. § 455(a) provides as follows:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

(a) Summary

This petition arises out of the nationwide Dalkon Shield litigation, which is now well into its second decade. Approximately 3,700 separate Dalkon Shield lawsuits are now pending against A.H. Robins in state and federal courts; approximately 7,000 other cases have been disposed of through settlement of judgment.

Since the beginning of this litigation, A.H. Robins has moved to disqualify only two judges. The first was Chief Judge Miles W. Lord of the District of Minnesota. *See Gardiner v. A.H. Robins Co.*, 747 F.2d 1180 (8th Cir. 1984). The second was Judge Frank G. Theis of the District of Kansas. Although the two motions to disqualify are related, this petition involves only the motion to recuse Judge Theis.

In April 1984, A.H. Robins filed a judicial misconduct complaint against Judge Lord under 28 U.S.C. § 372(c). At the written request of Judge Lord, the proceedings against him were opened to the public. *See* 28 U.S.C. § 372(c)(14)(A). Judge Lord's defense focused on his claim that A.H. Robins had not responded in good faith to plaintiffs' discovery. The Eighth Circuit rejected this defense. *Gardiner*, 747 F.2d at 1193.

To support the claim of discovery abuse, Judge Lord's counsel solicited an affidavit from Judge Theis. This was

done without any notice to A.H. Robins. The affidavit (App. C) was executed by Judge Theis and used in Judge Lord's defense. The affidavit became a public document and has been used against A.H. Robins in other cases.

Five months after the affidavit was executed, and six weeks after *Gardiner*, plaintiffs filed a motion (App. D) before Judge Theis for sanctions against A.H. Robins under Fed. R. Civ. P. 37(b). A side-by-side comparison of Judge Theis' affidavit and plaintiffs' motion shows that both make similar accusations against A.H. Robins. Thus, Judge Theis was called upon as a judge to rule on issues of fact that were the subject of his affidavit, which he submitted as a witness.

Faced with this situation, A.H. Robins moved to disqualify Judge Theis. The motion was denied, and the Tenth Circuit, without hearing oral argument, refused mandamus.

This petition for certiorari does not present any dispute on the facts or the applicable legal standard. Certiorari is warranted in this case because permitting Judge Theis to rule on plaintiffs' motion is an extreme departure from the accepted and usual course of judicial proceedings and requires this Court's supervision.

(b) The Role of Judge Theis In The Dalkon Shield Multidistrict Litigation

Since 1975, Judge Theis has supervised consolidated pre-trial proceedings (pursuant to 28 U.S.C. § 1407) in more than 1,000 cases alleging injuries caused by the Dalkon Shield. *See A.H. Robins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation*, 406 F. Supp. 540 (J.P.M.L. 1975). This massive litigation, however, was never consolidated for trial in the District of Kansas under 28 U.S.C. § 1404, primarily because most of these cases could not have been brought in that district in the first instance. All Dalkon Shield cases pending before Judge Theis are diversity actions under 28 U.S.C. § 1332(a)(1).

(c) The Submission Of Judge Theis' Affidavit

On April 25, 1984, A.H. Robins and three of its officers filed judicial misconduct complaints against Chief Judge Miles W. Lord of the District of Minnesota. On May 1, 1984, Chief Judge Donald P. Lay of the Eighth Circuit ordered an investigation of the complaints. At the express written request of Judge Lord, the investigation was made a matter of public record pursuant to 28 U.S.C. § 372(c)(14)(A).

Judge Lord defended his conduct on the defense that A.H. Robins had abused the discovery process. The Eighth Circuit later rejected this theory and held that Judge Lord's conduct "exhibit[ed] a pervasive bias and prejudice" against A.H. Robins. *Gardiner*, 747 F.2d at 1192-93.

On July 5, 1984, counsel for Judge Lord filed a five-page affidavit signed by Judge Theis (App. C), which then became a matter of public record. On July 9, in a public hearing before an investigatory committee of the Eighth Circuit Judicial Council, Judge Lord's counsel explained the origin of the affidavit:

> MR. BELL (counsel for A.H. Robins): Did you give us any notice that you were going to contact Judge Theis and let us have someone to respond to these reports?
>
> MR. WALTERS (counsel for Judge Lord): No, Judge Bell, I did not give any notice that I was in contact with Judge Theis.

(Relevant excerpts from the transcript of this hearing are attached in App. E.)

Because the assertions made by Judge Theis in the affidavit were damaging and, in A.H. Robins' view, erroneous, counsel for A.H. Robins met with Judge Theis and plaintiffs' lead counsel in chambers on July 20, 1984. Judge Theis described his affidavit as follows:

> JUDGE THEIS: But, my apprehensions, *from reading the—as I said, I read that affidavit, too. It was couched in what I call weasel words, in a way.* If you're not sure of something, you qualify about it "it appears to me", and so forth, and it certainly gave a strong appearance to me, and that was my reaction, that somebody had been pulling the wool over my eyes.

(Emphasis added; relevant excerpts from the July 20 conference in chambers are attached as App. F.)

(d) Plaintiffs' Motion For Discovery Sanctions

On December 13, 1984, plaintiffs in the consolidated cases before Judge Theis filed a motion for discovery sanctions against A.H. Robins (App. D). Plaintiffs' motion for sanctions rests on the same factual issues addressed in Judge Theis' affidavit, as shown below:

Judge Theis' Affidavit (July 1984)	Plaintiffs' Memorandum In Support of Motion for Sanctions (December 1984)
Without the necessity of comparing document by document what was or was not produced, *it would appear to me that a great volume of material was numbered for production but not produced, and that thousands of other documents were neither numbered, reviewed for relevance or privilege, nor produced.* It would appear to me that representations made to me concerning the completeness of discovery during the MDL proceedings are open to serious question . . . It would seem, in the light of the disclosures by the Masters, *that serious questions exist as to whether or not counsel who appeared before me, or their client, should be disciplined under Rule 16.*	Since [A.H. Robins] . . . has *withheld and destroyed sensitive documents,* it should be required to pay all costs of additional document production. Because *defendant wrongfully withheld key documents* and delayed recall of the device, it is now necessary to take additional videotaped depositions. Since the necessity for these depositions resulted from wrongful conduct, defendant should be ordered to produce the witnesses in Wichita, Kansas, and pay all costs, attorney fees, and expenses which result. Additional sanctions should be levied against defendant as requested in plaintiffs' motion.

(e) The Public Nature of Judge Theis' Affidavit

Judge Theis' affidavit has been published, *see* 1984 *OB/GYN Litigation Reporter*, 3,084-085 (Sept. 26, 1984) (full text of affidavit), discussed in the news media, *e.g.*, Mintz, "Jurist Hands A.H. Robins A Setback: Lord's Words 'Mild Punishment,'" The Washington Post, July 7, 1984, at A2, col. 4 (quoting from affidavit), and cited against A.H. Robins in other Dalkon Shield cases, *e.g.*, Motion To Compel Production With Supporting Brief 6, *Wolf v. A.H. Robins Co.*, No. H-84-638 (S.D. Tex., filed Dec. 20, 1984) ("Judge Theis concludes [in his affidavit] that Robins misled the MDL court when it represented that it had produced all requested documents . . ."). Judge Theis' affidavit has even been cited to Judge Theis. Amicus Brief In Support Of Plaintiff's Motion To Compel 21, *In re A.H. Robins "Dalkon Shield" IUD Products Liability Litigation*, MDL-211 (D. Kan., filed Jan. 2, 1985).

(f) A.H. Robins' Motion To Disqualify, And The Decisions Below

On January 10, 1985, A.H. Robins moved to disqualify Judge Theis on the ground that his affidavit in defense of Judge Lord disqualified him under 28 U.S.C. § 455(a) from ruling on plaintiffs' motion. On February 1, 1985, Judge Theis issued an Opinion and Order denying the motion to disqualify (App. B). Although the Opinion and Order is twenty-one typed pages, it does not describe or mention the circumstances surrounding the drafting or execution of Judge Theis' affidavit.

A.H. Robins petitioned the Tenth Circuit for a writ of mandamus. On February 19, the Tenth Circuit requested briefs from the opposing parties, which were submitted. On March 15, 1985, without hearing oral argument, the Tenth Circuit denied mandamus without opinion.

As of the date of this petition, Judge Theis has not issued a ruling on plaintiffs' motion for sanctions. If such a ruling is issued while this petition is pending, A.H. Robins will promptly advise the Clerk of this Court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because, in allowing Judge Theis to rule on plaintiffs' motion for discovery sanctions, the Tenth Circuit has sanctioned an extreme departure from the accepted and usual course of judicial proceedings, which calls for an exercise of this Court's supervision. Supreme Court Rule 17.1(a).

Judge Theis was a witness *against* A.H. Robins in the judicial misconduct proceeding. He now claims, however, that his impartiality in ruling on plaintiffs' motion for sanctions cannot reasonably be questioned under 28 U.S.C. § 455(a). In his Opinion and Order, Judge Theis makes the remarkable assertion that the affidavit does not "exhibit any predisposition for or against any party or counsel." Yet his affidavit concludes as follows:

> *Without knowing all of the details* it appears that under the circumstances known, Judge Lord's remonstrance to the responsible company officials was *mild punishment indeed considering the strong possibility that such apparent misrepresentations and trial tactics seem to permeate the proceedings here and elsewhere* (emphasis added).

A reasonable person, after reading this sentence, would surely conclude that Judge Theis lacked impartiality.

This Court has held that the finder of fact must be "free from external causes tending to disturb the exercise of deliberate and unbiased judgment." *Mattox v. United States*, 146 U.S. 140, 149 (1892) (ordering new trial in criminal case on ground of *ex parte* contacts with jury). Judge Theis intends to sit as the fact-finder on plaintiffs' motion for sanctions. Yet he dealt pri-

vately with counsel in a separate proceeding and submitted an affidavit on what is now the subject of plaintiffs' motion. He intends to be a judge where he was formerly a witness. This is not mere error. This is an extreme departure from a basic precept of this country's jurisprudence. *See In re Murchison*, 349 U.S. 133, 136 (1955); Code of Judicial Conduct for United States Judges, Canon 3(A)(4) and (6), at 69 F.R.D. 275-76 (1975).

This is not a case such as *United States v. Grinnell Corp.*, 384 U.S. 563, 582-83 (1966), where the judge's knowledge of the facts resulted from a review of the record in the case before him. Nor is it similar to the case where a judge testified *before* nomination to the federal bench. *See Laird v. Tatum*, 409 U.S. 824 (1972) (Memorandum opinion of Justice Rehnquist). Finally, this is not a situation where the judge earlier heard and decided a related case. *See Meeropol v. Nizer*, 429 U.S. 1337 (1977) (Memorandum opinion of Justice Marshall).

Instead, this case presents the question whether a federal judge should be permitted to be a witness in one proceeding, and a judge in another, with respect to the same facts. This Court has never addressed this important question.

The purpose of § 455(a) is to "deal with . . . the appearance of possible bias." *United States v. Will*, 449 U.S. 200, 216 (1980). *Cf. Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) ("[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias"). The lower courts agree that the standard under § 455(a) is whether the relevant facts would lead a reasonable person to doubt the judge's impartiality, even though the judge himself believes he can be evenhanded. *Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671, 674 (1st Cir.

1984) (citing cases and holding that judge who met privately with newspaper reporter who was employed by a party must be disqualified), *cert. denied*, 53 U.S.L.W. 3528 (Jan. 22, 1985).

There are five critical facts that show Judge Theis cannot be permitted to rule on plaintiffs' motion:

> (i) The misconduct proceeding was entirely separate from the multidistrict litigation pending before Judge Theis;
>
> (ii) Judge Theis voluntarily became a witness in the misconduct proceeding by submitting his affidavit;
>
> (iii) The affidavit was not based on any record evidence before Judge Theis;
>
> (iv) Judge Theis gave A.H. Robins no prior notice that he was conferring privately with Judge Lord's counsel and preparing the affidavit; and
>
> (v) Plaintiffs' motion for discovery sanctions rests on factual questions that Judge Theis had already answered in his affidavit.

In light of these facts, the denial of mandamus [1] by the Tenth Circuit amounts to permitting Judge Theis to combine the inconsistent roles of witness and judge. This so far departs from the accepted and usual course of judicial proceedings as to warrant review by this Court.

---

[1] Although the Tenth Circuit gave no reason for denying the writ, it is clear that mandamus was the appropriate remedy. *Bell v. Chandler*, 569 F.2d 556, 559 (10th Cir. 1978) ("There is no question but that a mandamus petition may be used to force the disqualification of a district court judge").

CONCLUSION

For the reasons stated in this petition, A.H. Robins requests this Court to grant the writ of certiorari to review the judgment of the Tenth Circuit.

Respectfully submitted,

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April 15, 1985

APPENDICES

APPENDIX A

MARCH TERM—March 15, 1985

Before Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges, United States Court of Appeals [for the Tenth Circuit]

No. 85-1244

A.H. ROBINS COMPANY, INCORPORATED,
Petitioner,

v.

HONORABLE FRANK G. THEIS, Judge of the United States District Court for the District of Kansas,
Respondent.

This matter comes on for consideration of petitioner's application for a writ of mandamus to the district court directing the disqualification of the Honorable Frank G. Theis, Judge of the United States District Court for the District of Kansas.

Upon consideration thereof, the application is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MDL Docket No. 211
"All Cases"

IN RE: A. H. ROBINS COMPANY, INC.,
"DALKON SHIELD" IUD
PRODUCTS LIABILITY LITIGATION

[Filed Feb. 1, 1985]

OPINION AND ORDER

Defendant A. H. Robins Company, Incorporated ("Robins") has filed a motion under 28 U.S.C. § 455(a) seeking the recusal of the presiding judge in this case. This motion is based solely upon this Court's filing of an affidavit before an investigatory panel of the Eighth Circuit Judicial Council concerning Robins' charges of judicial misconduct by the Honorable Miles W. Lord, Chief Judge of the United States District Court for the District of Minnesota.

Since December 10, 1975, this Court has presided over the instant multidistrict litigation ("MDL") proceedings, covering over a thousand federal cases and initially several hundred tagalong state cases involving products liability issues concerning the Dalkon Shield, a birth control device manufactured by Robins. During 1984, Judge Lord made certain remarks to Robins' executives during a set-

tlement conference involving seven Dalkon Shield lawsuits pending before him. As a result of these remarks, Robins filed a misconduct complaint against Judge Lord in the Eighth Circuit. In addition, Robins appealed the district court's actions during the settlement negotiations, which appeal was decided on November 2, 1984, in *Gardiner v. A. H. Robins Co., Inc.*, 747 F.2d 1180 (8th Cir. 1984). In the disciplinary proceeding before the Eighth Circuit Judicial Council, this Court filed an affidavit which related the discovery process in the multidistrict Dalkon litigation and which espoused the right of a judge to comment on the proceedings before him. On January 10, 1985, Robins filed the present motion for recusal.

The Court would first disassociate itself from the contention of plaintiffs' counsel that the Robins' disqualification motion is somehow untimely. The Court agrees with Robins that such motion is timely and within the ambit of counsels' duty to use all possible judicial processes to protect their client.

Initially at issue is the applicable legal standard governing the consideration of the motion for recusal. Under 28 U.S.C. § 455(a), "[a]ny . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The 1974 amendment to section 455 changed the standard for recusal from a subjective one, which left to the judge "in his opinion" the decision whether it would be improper to sit, 28 U.S.C. § 455 (1970), to the present objective standard, which requires disqualification whenever the judge's impartiality "might reasonably be questioned." In its motion for recusal, Robins has placed emphasis on the single term "might." More properly, the inquiry should be whether "there is a reasonable factual basis for doubting the judge's impartiality. . . . Disqualification for lack of impartiality must have a *reasonable* basis." H. Rep. No. 1435, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6355 (emphasis in original). The

test is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge or in the mind of the litigant filing the motion for recusal, but rather in the mind of a reasonable person. *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976), *cert denied*, 430 U.S. 909 (1977).

Prior to the 1974 amendment, the rule was that a judge had a duty to sit on a case if the statutory grounds for his disqualification had not been established. *See United States v. Diorio*, 451 F.2d 21, 24 (2nd Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *United States v. Anderson*, 433 F.2d 856, 860 (8th Cir. 1970); *Edwards v. United States*, 334 F.2d 360, 363 (5th Cir. 1964). Courts generally agree that the amended version of section 455 was intended to displace the so-called "duty to sit" decisions. *See, e.g., Parrish v. Board of Commissioners of the Alabama State Bar*, 524 F.2d 98, 103 (5th Cir. 1975). Recent decisions have noted, however, that a "trial judge has as much obligation not to recuse himself when there is no reason to as he does to recuse himself when the converse is true." *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976). *Accord United States v. Baskes*, 687 F.2d 165, 170 (7th Cir. 1981).

Several additional standards give the Court guidance in its consideration of Robins' motion for recusal, a motion the Court recognizes Robins did not make lightly. Dk. No. 727, p. 2. It is fundamental that the determination of bias, prejudice or lack of impartiality must be made on the basis of conduct which is extrajudicial in nature. *United States v. Grinnell*, 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *United States v. Bray*, 546 F.2d 851, 859 (10th Cir. 1976); *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976); *United States v. Cook*, 400 F.2d 877, 879 (4th Cir. 1968), *cert. denied*, 393 U.S. 1100 (1969).

Plaintiffs allude to ulterior motives behind the present motion, such as forum-shopping. To evidence this contention, plaintiffs suggest that Robins' motion for class action certification, filed in *In Re: Dalkon Shield Punitive Damages Litigation*, No. 84-0884-R (E.D. Va., filed October 22, 1984), and Robins' motion for transfer of MDL 211 to the Eastern District of Virginia, filed with the Judicial Panel on Multidistrict Litigation, indicate an intent to shift the focus of the Dalkon Shield litigation to Robins' home district of Virginia. The Court believes that forum-shopping is not an appropriate subject of inquiry for the purposes of the present motion. A single matter is properly before the Court at this time: whether this Court should recuse under section 455.

The Court is mindful of the proposition that "disqualification is not favored where . . . a single judge has acquired by experience familiarity with a protracted, involved case which could not easily be passed on to a second judge." *City of Cleveland v. Cleveland Electric Illuminating Co.*, 503 F. Supp. 368, 370, *mandamus denied sub. nom City of Cleveland v. Krupansky*, 619 F.2d 576 (6th Cir. 1980). *See also National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). With the above standards in mind, the Court shall proceed to analyze the substance of the parties' arguments.

The precise issue at hand is somewhat difficult to capsulize. Robins has framed the issue by employing a number of terms, such as "*ex parte* communication," "witness in a proceeding," and "personal opinion." These characterizations miss the mark. The issue concerns whether this Court's remarks took place in an extrajudicial context or whether they constituted appropriate judicial action. More particularly, may a judge come to the assistance of a fellow judge in a disciplinary proceeding without risking disqualification himself?

To be disqualifying, the alleged bias or prejudice must arise from an extrajudicial source and must result in an opinion "on some basis other than what the judge learned from his participation in the case." *Davis v. Cities Service Oil Co.*, 420 F.2d 1278, 1282, (10th Cir. 1970) (citing *United States v. Grinell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) *See also Smith v. Halford*, 570 F.Supp. 1187, 1189 (D. Kan. 1983)). The Fifth Circuit has held that although a judge's remarks or behavior occur in a judicial context, this does not exclude them from scrutiny if they reflect "such pervasive bias and prejudice as would constitute bias against a party." *Phillips v. Joint Legislative Committee on Performance and Expenditure Review*, 637 F.2d 1014, 1020 n.7 (5th Cir. 1981), *cert. denied sub. nom Mississippi v. Phillips*, 102 S.Ct. 2035 (1982). Counsel for Robins, however, carefully noted at oral argument on the recusal motion that he advanced no allegations of actual bias or prejudice, but that he was concerned only about the appearance of partiality.

The Court believes that the appearance of impartiality is as important as the fact of it, but finds that the question of impartiality cannot be analyzed *ex nihilo*. Thus, the inquiry must be targeted toward whether the Court's action in filing an affidavit in Judge Lord's chastizement proceeding occurred in a judicial or extrajudicial context.

Numerous courts have drawn the distinction between bias that is personal in nature and bias that is judicial, *see, e.g., United States v. Carmichael*, 726 F.2d 158, 160 (4th Cir. 1984), but few have delineated the contrast between judicial and extrajudicial activities. It is clear that a motion for disqualification may not be predicated on a judge's rulings "in the instant case or in related cases, nor on a demonstrated tendency to rule any particular way, nor on a particular judicial leaning or attitude derived from his experience on the bench." *Phillips*, 637 F.2d at 1020. *See also Shaw v. Martin*, 733 F.2d 304, 308

(4th Cir. 1984). Beyond that, the ambit of the judicial context is somewhat murky.

To ascertain the nature of this Court's action in filing an affidavit in a fellow judge's disciplinary proceeding, a fairly unique set of circumstances unaddressed directly by the reported cases, the Court looks to cases focusing upon whether a judge's conduct occurred in a judicial or extrajudicial capacity. During the Watergate prosecutions, the intrepid probing of Judge Sirica led to the revelations of corruption at the highest levels of government. Judge Sirica presented the testimony of a witness which neither party had called, an action approved in *United States v. Liddy*, 509 F.2d 428, 438-42 (D.C. Cir. 1974). He ordered the production of presidential tape recordings, an order upheld in *United States v. Nixon*, 418 U.S. 683 (1974). During sentencing, Judge Sirica indicated that cooperation with the prosecution might result in lighter sentences. *United States v. McCord*, 509 F.2d 334, 347 (D.C. Cir. 1974). Judge Sirica commented to the media that the Watergate defendants could receive as fair a trial in the District of Columbia as in any other federal court in the United States. *United States v. Haldeman*, 559 F.2d 31, 136 (D.C. Cir. 1976), *cert. denied sub. nom Ehrlichman v. United States*, 431 U.S. 933 (1977). In the conspiracy trial of John Mitchell, John Ehrlichman and others, several defendants moved for the recusal of Judge Sirica because of his involvement in so many aspects of the Watergate indictments and prosecutions. Judge Sirica denied recusal on the ground that the allegations showed only prior judicial actions and that no "personal" bias, only "judicial" bias, had been claimed. *United States v. Mitchell*, 377 F. Supp. 1312, 1320 (D.D.C. 1974). The judge's use of his knowledge derived from judicial proceedings in the administration of other such proceedings withstood repeated attacks. Judge Sirica's judicial activism was commended in *McCord*, 509 F.2d at 347:

> "A superficial review of these events might support the inference that at least Judge Sirica communicated an appearance of inquisitional attitude inconsistent with notions of a fair trial. However, such a view assumes an exceedingly narrow interpretation of the responsibilities of a trial judge. . . . The judge, like the prosecutor in this respect, is not a passive bystander in the arena of justice, a spectator at a 'sporting event'; rather, he or she has the most pressing affirmative responsibility to see that justice is done in every case."

In *United States v. Serrano*, 607 F.2d 1145, 1150 (5th Cir. 1979), *cert. denied*, 445 U.S. 965 (1980), the Fifth Circuit upheld Judge Terrell Hodges' denial of a motion to disqualify premised upon his remarks which indicated an intention to impose stiff penalties to curb large scale drug importation: "Reading Judge Hodges' remarks in context clearly demonstrates that any predisposition to sentence volume drug offenders severely stemmed from his observations in a strictly judicial capacity as to the volume of such cases in the courts and the lack of deterrent effect of light sentences for such offenders." The Court acknowledged that acquisition of information in one case could be employed to fashion an opinion in other related cases and held that any impressions formed and acted upon were "judicial rather than personal." *Id.*

Finally, in *Bradley v. Milliken*, 620 F.2d 1143 (6th Cir. 1980), *cert. denied*, 449 U.S. 870 (1981), the Sixth Circuit refused to disqualify Judge Robert DeMascio, of the United States District Court for the Eastern District of Michigan, under section 455(a) on the ground that he met *ex parte* with representatives of a school board in a school desegregation case. The Court held that although Judge DeMascio's actions were "perhaps a bit unorthodox," they constituted "judicial activities designed to ensure a community climate receptive to [the] court's orders." *Id.* at 1157.

In sum, the above cases indicate a tendency on the part of courts to define the ambit of "judicial" activity quite broadly. Actions taken by a court in one case which draw upon the court's experience in prior cases have been held to constitute judicial actions. Furthermore, activities of judges in meeting with the press and with litigants were sanctioned as actions which insured the effective and efficient administration of the courts.

Applying the above precepts, the Court determines that its filing of an affidavit was an action performed in the Court's judicial capacity, rather than an extrajudicial activity. The Court's thoughts were voiced in a judicial setting—before the investigatory panel of the Eighth Circuit Judicial Council—and the informational source upon which they drew—the Court's eight and one-half years of experience in the multidistrict Dalkon litigation—was distinctly judicial.

Furthermore, in a broader sense, the Court's actions went to the heart of the judicial process. The substance of the Court's affidavit in part concerned possible discovery abuses potentially practiced both in the Dalkon cases before Judge Lord and in the instant cases. It is the duty of a trial judge to supervise, manage and control pretrial discovery, "for he is the single individual who, in the exercise of this purely judicial discipline, can do so effectively." *City of Cleveland*, 503 F. Supp. at 375 n.4. In the present matter, it was particularly the province of this Court, in control of over one thousand cases consolidated into multidistrict litigation, to affirmatively exercise this duty and to inquire into and attempt to thwart any perceived abuses of the discovery process.

This Court is charged by Canon 1 of the Code of Judicial Conduct for United States Judges with the obligation to uphold the integrity of the judiciary. It was precisely this critical function that the Court attempted to perform by filing the affidavit: the prevention of any possible fraud from being perpetrated upon the courts. As the

United States Supreme Court stated in *Wood v. Georgia*, 370 U.S. 375, 383 (1962), "[T]he right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government. . . ." The Court finds completely unpersuasive the intimation that it is a demonstration of bias for a judge who has been working on discovery for over eight years to comment on and uncover possible abuses in the proceedings before him. Surely section 455(a) never contemplated crippling the courts.

Regarding Robins' specific concerns, Robins first contends that the appearance of impartiality is threatened by this Court's having stated in the affidavit a "personal opinion" that Robins might be guilty of discovery misconduct and now being called upon to make just such a determination in the current litigation. As explained above, the opinion expressed in the affidavit was particularly judicial. Furthermore, mere prior involvement with an issue cannot disqualify a judge; "otherwise, a judge could never reach the end of a case without being disqualified through exposure to it in earlier stages." *United States v. Wayne County Department of Health-Air Pollution Control Division*, 571 F.Supp. 90, 93 (E.D. Mich. 1983).

In addition, whatever partiality is alleged is simply not the type of partiality prohibited by section 455:

> "While bias or prejudice may spring from many sources, often extrajudicial in their origin, the negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes. It is an animus more active and deep-rooted than an attitude of disapproval toward certain persons because of their known conduct, unless the attitude is somehow related also to a suspect or invidious

> motive such as racial bias or a dangerous link such as financial interest, and only the slightest indication of the appearance or fact or bias or prejudice from these sources would be sufficient to disqualify."

United States v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980). The affidavit does not address the merits of the present litigation nor does it exhibit any predisposition for or against any party or counsel. In fact, the affidavit specifically stated: "I have always had courteous treatment and high regard for the gentlemanly conduct and representations of Alex Slaughter, lead counsel for Robins, and local counsel, Ron Heck." Affidavit of Frank G. Theis, *In Re Complaint of A. H. Robins Co., Inc.*, JCP 84-001, p. 4 (8th Cir. 1984). There is a salient difference between a judge making observations about proceedings and being prejudiced regarding parties or issues in proceedings. The affidavit exhibits experience; that is not tantamount to partiality.

Finally, of primary importance, a judge's comment is disqualifying "only if it connotes a fixed opinion." *Haldeman*, 559 F.2d at 136. Even the most unfavorable reading of the substance of the affidavit cannot lend any support to the charge of a fixed opinion on the issue of potential discovery abuses. The affidavit spoke only in terms of appearances:

> "The reports . . . *would seem to indicate* that my understanding of the status of document production at the close of the second MDL hearing was inconsistent with the facts as they then existed. . . . [*I*]*t would appear* to me that a great volume of material was numbered for production but not produced. . . . *It would appear to me* that representations made to me concerning the completeness of discovery during the MDL proceedings are open to serious question."

Affidavit, pp. 1-2.

In the affidavit the Court spoke in hedging terms for a specific reason. The Court had not then and has not yet made up its mind regarding potential discovery abuses. Proceedings have been started before this Court to determine whether there exists any semblance of validity to the discovery abuses claimed by plaintiffs. A number of motions are presently on file before this Court concerning allegations of misconduct, such as harboring and the destruction of evidence. The Court has received briefs on these matters and will conduct hearings concerning them: both Robins and plaintiffs will be afforded every opportunity to be heard on these issues. The commands of due process will be fully satisfied before this Court examines the issues and renders a decision on the merits. In litigation of this size, the Court recognizes that a voluminous amount of records are in the fray and that any failure to produce documents may easily be the result of inadvertence. The Court's conduct during the course of these proceedings indicates an abundance of caution in making decisions. The Court *sua sponte* held in abeyance any receipt of evidence on the current discovery motions in MDL 211 pending oral argument, receipt of briefs and resolution of the present recusal motion. Far from indicating an appearance of partiality, the Court's actions exhibit a careful and fair-minded attitude. The affidavit itself suggests the Court's flexibility regarding the satisfaction of discovery orders.

> "Since commencing these proceedings, they have consumed unnumbered days of court time, have lasted over a period of eight and one-half years, and are still ongoing. During this time, thousands of documents had been produced and *I was satisfied that appropriate discovery had been made, that only privileged documents had been withheld, and that all available relevant evidence in the possession of A. H. Robins and its attorneys had been made available to the plaintiffs.* . . .

> In August of 1981, and again in September, 1982, counsel for plaintiffs requested that I reopen these proceedings and represented to me as a reason therefor that certain documentation existed which had not been produced pursuant to my previous discovery orders, and to make video depositions of key Robins officials. *After an evidentiary hearing, I reopened discovery proceedings.* In the course of these proceedings, many additional documents were produced. *At the conclusion of these proceedings, I was again satisfied that all relevant and non-privileged materials had been produced.*"

Affidavit, pp. 1-2 (emphasis added). Any tendency to attribute bias to the language contained in the Court's affidavit is fairly dispelled when the affidavit is read in its entirety and in context.

Next, Robins claims that this Court had *ex parte* communications with Judge Lord and his counsel. Robins' reliance on the notion of *ex parte* communications is misplaced. Communication between two federal judges or between a judge and another judge's counsel is not *ex parte* communication. This Court did receive the reports of the Special Masters, officers of the federal court in Minnesota, copies of which reports were provided to both parties. The Court did not conduct any extrajudicial investigation of the facts surrounding the complaint against Judge Lord.

Regarding the timing of this Court's review of the Special Masters' reports, plaintiffs contend that since they requested this Court to examine the reports of the Special Masters, which reports plaintiffs submitted to the Court on December 11, 1984, before defendant filed the recusal motion on January 10, 1985, that the allegation of *ex parte* conduct is moot. The Court agrees with Robins that the Court must focus its attention on its actions at the time they were undertaken.

Numerous cases have allowed *ex parte* communications and receipt of information to protect the integrity of the judicial process. In *United States v. Phillips*, 664 F.2d at 1003, the Fifth Circuit Court of Appeals held that the trial court was not improperly involved in collateral investigation of alleged plans to disrupt the trial when strike force attorneys contacted the presiding judge and informed him of the plans of certain defendants to flee from the country if bond was not revoked. The Court held that the communications did not require recusal of the judge and noted that any *ex parte* revelations were made to enable the judge to perform his duty to conduct an orderly trial.

Similarly, in *United States v. Jackson*, 430 F.2d 1113 (9th Cir. 1970), the Court held that *ex parte* communication of threats to witnesses was not a basis for disqualification. In *Bradley v. Milliken*, 620 F.2d at 1157, the Sixth Circuit held that a judge's *ex parte* meetings with a school board in developing a desegregation plan did not create an appearance of partiality because the meetings were a judicial activity intended to insure a community climate receptive to the court's orders.

Finally, in *United States v. Mitchell*, 377 F.Supp. at 1322, the Court noted that "[j]udges routinely preview evidence or information bearing on a case in other settings, with no thoughts of disqualification arising as a result." In short, "'[k]nowledge acquired by a judge while he performs judicial duties does not constitute grounds for disqualification.'" *Katsaros v. Cody*, 744 F.2d 270, 283 (2nd Cir. 1984) (quoting *United States v. Coven*, 662 F.2d 162, 168 (2nd Cir. 1981), *cert. denied*, 456 U.S. 916 (1982)).

As discussed above, the Court's actions in the instant case involved the performance of judicial duties. The reports of the Special Masters concerned specifically the same area of discovery which this Court has been shepherding for many years. *If* the claims of Judge Lord

and his experienced Masters were true, in whole or in part, then the basis of his comments, if not his precise choice of procedure and words, had important ramifications in similar litigation pending in federal courts throughout the United States and certainly in this court. The Court's acquaintance with information pertinent to this case has in every instance flowed from judicial sources. To the extent that the receipt of any information could be characterized as *ex parte*, it takes on no pernicious connotation. The information was brought to this judge's attention during the performance of his judicial duties.

Robins characterizes the affidavit as conflicting with the principles underlying 28 U.S.C. § 455(b)(5)(iv), which requires disqualification if a judge is "likely to be a material witness in the proceeding." This judge is unlikely to be called as a witness in the current multidistrict Dalkon litigation. Furthermore, the concerns underpinning this provision are inapposite to the present case. As the case cited in part by Robins, *In Re Continental Vending Machine Corp.*, 543 F.2d 986, 995 (2nd Cir. 1976), goes on to state:

> "The purpose of this provision is to prevent a judge from having to pass on the competence and veracity of his own testimony given with respect to a matter presently in controversy before him. The mere fact that he may have testified with respect to some wholly unrelated matter should not disqualify him (citations omitted), since it does not require him to pass upon the credibility of his own testimony and there is no reason to suppose that his decision might be affected by his unrelated testimony. Were the rule otherwise, a judge in an extended and multisegmented . . . case . . . who has patiently sat on the case for many years, would be forced, for no sound reason, to disqualify himself as to the entire case, leading to wasteful duplication, delay and expense."

The only matter to which the Court affirmatively "testified" was the right of a trial judge to comment on the proceedings before him. Affidavit, p. 5. Furthermore, this Court was a "witness" only in his judicial capacity. *See United States v. Long*, 88 F.R.D. 701, 702 (W.D. Pa. 1981). Finally, the Court will not be required to pass upon the credibility or veracity of its own "testimony" in the instant MDL proceedings, since the affidavit merely said that serious questions concerning discovery abuses were raised in the Dalkon litigation. Long prior to the affidavit submitted by the Court in Judge Lord's disciplinary proceedings, serious questions were raised by plaintiffs in the present litigation regarding possible discovery abuses. Dk. No. 643. The allegation that this Court is "likely to be a witness" in the instant proceedings is without merit.

Robins' final concern is the effect of the affidavit. Robins notes that plaintiffs in other Dalkon cases have cited the affidavit in support of arguments that Robins is guilty of discovery abuses and that the affidavit has been the subject of widespread media publicity. The affidavit should not have been made a matter of public record. Disciplinary proceedings are supposed to be confidential and only at Judge Lord's request did the matter become public.

Robins intimates that because the affidavit became a matter of public record, it is public comment about a pending proceeding, in violation of Canon 3(A)(6) of the Code of Judicial Conduct for United States Judges. Public records are not equivalent to public comment. Otherwise, all opinions would be construed as public comment. Finally, the Court cannot control the use of his affidavit by partisan plaintiffs, nor can the Court muzzle the media. A judge considering whether to disqualify himself must ignore rumors, innuendos and erroneous information published as fact in the newspapers. *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

Judicial independence cannot be subservient to public opinion.

Robins' motion for recusal wholly ignores the primary purpose of the Court's affidavit. The affidavit states:

> "I do not believe a judge should be hobbled or censored for good faith remarks he makes with full knowledge of facts and circumstances which appear to him to inhibit the processes of justice and the inherent right of free speech of a judge to prevent possible fraud upon the court.

Affidavit, p. 5.

Many decisions have recognized the power of judges to comment on the evidence in a case and to express opinions. *See, e.g., United States v. Bray*, 546 F.2d at 858; *United States v. Womack*, 454 F.2d 1337, 1342 (5th Cir. 1972), *cert. denied*, 414 U.S. 1025 (1973). A long line of Tenth Circuit cases have upheld even remarks presented in strident terms. *United States v. McKay*, 491 F.2d 616 (10th Cir. 1973), *cert. denied*, 419 U.S. 1047 (1974); *Whitlock v. United States*, 429 F.2d 942 (10th Cir. 1970); *Cooper v. United States*, 403 F.2d 71 (10th Cir. 1968). Judge Lord expressed his views on a particular case; this Court commented on Judge Lord's expression of views.

In addition, this Court was appalled at the procedural treatment of Judge Lord in the filing of a disciplinary proceeding, particularly when the avenue of appeal not only remained open to but was utilized by Robins. Use of such indirect avenues of reproach is antithetical to the proper functioning of the judicial system; its use has a chilling effect on the independence of a federal judge. In *Gardiner v. A. H. Robins*, 747 F.2d 1180, 1190 (8th Cir. 1984), the Eighth Circuit agreed:

> "[T]he propriety of the court's comments is at the heart of a disciplinary proceeding commenced by Robins and its officers against Judge Lord under the

> Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372 (1982), now pending before the Judicial Council of this circuit. It is far more desirable for this issue to be addressed in the normal appellate process than in the extraordinary context of a disciplinary proceeding."

Ultimately, the Eighth Circuit Judicial Council recognized that Robins' action in filing a disciplinary charge was duplicative of the action taken by appeal. In *In Re Complaint of A. H. Robins*, JCP 84-001 (8th Cir. December 5, 1984), the Judicial Council dismissed the disciplinary complaint as moot because of the action taken by the Eighth Circuit on appeal.

In *Gardiner*, the Eighth Circuit commented upon the proper role of a judge in the administration of justice:

> "The judicial branch of the government is not and should not become an advocate for private causes. A federal district judge holds one of the most powerful and respected offices in this country. The judge exercises a power over a person's life, liberty, and property, legally restrained only by the review processes of a court of appeals and the Supreme Court of the United States.

Gardiner v. A. H. Robins, 747 F.2d at 1194.

This Court fully agrees with the Eighth Circuit's pronouncements regarding the power and the duties of a federal judge and the obligation incumbent upon all federal judges to maintain impartiality. To the extent that Judge Lord overstepped the bounds of propriety and personally assailed Robins' officers, this Court respectfully disagrees with his reprimand. This Court, however, continues to espouse the right of a federal judge to comment on matters before him. The day that a judge cannot comment on the evidence in a case before him, or the applicability of precedential law to the case, will be the day that a free and independent judiciary is dead.

In the instant motion for recusal, Robins attempts to use the result of the *Gardiner* decision to argue that this Court should not have filed an affidavit in support of Judge Lord's practices. Robins appears to be constructing an oblique argument of guilt by association. Merely because the Eighth Circuit ruled adversely to Judge Lord on appeal in no way compels the conclusion that this judge, in a separate chastizement proceeding, should not have supported a fellow judge's right to speak freely. A judge should not be disqualified merely because he believes his brethren have rights under the First Amendment within the confines of the canons of judicial ethics.

In sum, the test for recusal is whether "a reasonable [person] . . . under all the circumstances" would question the judge's impartiality. *United States v. Gigax*, 605 F.2d 507, 511 (10th Cir. 1979). Robins has focused on particular circumstances and has viewed them with a partisan eye. Although the facts surrounding the complaint against Judge Lord and this Court's filing an affidavit in a chastizement proceeding are somewhat unusual, they do not, when examined in their entirety, compel this Court's recusal in the instant case. If this Court were to disqualify in the present case, the precedent set would place the judiciary between Scylla and Charybdis; a judge would be required to choose between protecting the integrity of the judicial process and risking disqualification himself.

IT IS THEREFORE ORDERED that Robins' motion for recusal is hereby denied.

At Wichita, Kansas, this 1st day of February, 1985.

/s/ Frank G. Theis
United States District Judge

APPENDIX C

JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT BEFORE THE INVESTIGATORY COMMITTEE

IN RE: COMPLAINT OF A. H. ROBINS COMPANY, INCORPORATED
JCP 84-001

IN RE: COMPLAINT OF E. CLAIBORNE ROBINS, JR., *et al.*
JCP 84-002

AFFIDAVIT

STATE OF KANSAS)
) SS:
COUNTY OF SEDGWICK)

FRANK G. THEIS, being duly sworn, states as follows:

1. I have presided since December 10, 1975, over the multidistrict litigation proceedings covering over a thousand federal cases and several hundred tagalong state cases involving the Dalkon Shield, a birth control device manufactured by the A. H. Robins Company.

2. The object and purpose of these multidistrict proceedings was to coordinate nationwide discovery on the generic aspects of product liability of Robins and to avoid duplication and disparate requests and responses. It was my intention to effectively complete all document discovery and depositions so that a trial package could be available containing all relevant and admissible evidence.

3. Since commencing these proceedings they have consumed unnumbered days of court time, have lasted over a period of eight and one-half years, and are still ongoing. During this time thousands of documents had been produced and I was satisfied that appropriate discovery had been made, that only privileged documents had been withheld, and that all available relevant evidence in the possession of A. H. Robins and its attorneys had been made available to the plaintiffs. A multipage docket sheet is attached hereto showing affiant's exposure to the MDL cases.

4. In August of 1981, and again in September, 1982, counsel for plaintiffs requested that I reopen these proceedings and represented to me as a reason therefor that certain documentation existed which had not been produced pursuant to my previous discovery orders, and to make video depositions of testimony of key Robins' officials. After an evidentiary hearing I reopened discovery proceedings. In the course of these productions many additional documents were produced. At the conclusion of these proceedings I was again satisfied that all relevant and nonprivileged materials had been produced. This was likewise the apprehension of plaintiffs' counsel.

5. I have been furnished by counsel for Chief Judge Miles W. Lord the reports of Special Masters appointed by him to aid in the document production at the corporate offices of A. H. Robins and at the offices of its attorneys. There are certain aspects of these reports which are of particular significance to me in the light of my previous experience in this matter and the prior representations and assurances by Robins' counsel to both plaintiffs' lead counsel and to me that discovery had been completed. The reports of Masters Thompson and Bartsh contain information which would seem to indicate that my understanding of the status of document production at the close of the second MDL hearing was inconsistent with the facts as they then existed. Specifically, the

Masters' reports indicate that the production ordered by Judge Lord "required the production of thousands of documents which had not been previously produced." This appears to be contrary to the representations made to me by counsel for A. H. Robins.

6. During the MDL proceedings, a great deal of time and effort was consumed attempting to establish the extent to which Robins' officials, and particularly its medical department, had knowledge concerning the dangerous propensities of the Dalkon Shield. Insofar as I can recall, there was a paucity of information concerning adverse reaction reports by physicians and patients. In Master Thompson's report, he makes reference to one box labeled nonresponsive by A. H. Robins. Upon examination of these documents, Master Thompson found them to be responsive. These documents, marked nonresponsive, were the focal point of much of the document discovery effort before me. Their existence and contents would, I believe, be relevant, cogent and critical evidence bearing upon defendant's knowledge and the issue of punitive damages.

7. Without the necessity of comparing document by document what was or was not produced, it would appear to me that a great volume of material was numbered for production but not produced, and that thousands of other documents were neither numbered, reviewed for relevance or privilege, nor produced. It would appear to me that representations made to me concerning the completeness of discovery during the MDL proceedings are open to serious question. While there may possibly be explanations and justifications, this does not appear in any of the materials that have been furnished to me. It would seem, in the light of the disclosures by the Masters, that serious questions exist as to whether or not counsel who appeared before me, or their client, should be disciplined under Rule 16.

8. Further, it appears to me—in the light of the background of the cases before me, a review of Judge Lord's

February 8, 1984 discovery order and the information which was available to him through the Masters—that Judge Lord was mandated under Rule 16 to take some action to vindicate the power of the Court and to maintain the integrity of the discovery process. I have always had courteous treatment and high regard for the gentlemanly conduct and representations of Alex Slaughter, lead counsel for Robins, and local counsel, Ron Heck. As stated previously, however, I have had to spend much time on adversarial hearings whose necessity was not always apparent, other than delay. Likewise, the long experience of sitting on the video depositions in the discovery, acquainted me with a pattern of repetitive and dilatory tactics which I frowned upon, and later made evidentiary rulings upon, to expedite the course of the many Dalkon Shield cases by eliminating repetitive objections in the many federal trial courts in which the cases were and are still pending. The frustrations and confusion which I have at times experienced in the eight years I have been shepherding this discovery appear to have been part of a pattern of that which occurred before Judge Lord. I do not believe a judge should be hobbled or censored for good faith remarks he makes with full knowledge of facts and circumstances which appear to him to inhibit the processes of justice and the inherent right of free speech of a judge to prevent possible fraud upon the court. Without knowing all of the details it appears that under the circumstances known, Judge Lord's remonstrance to the responsible company officials was mild punishment indeed considering the strong possibility that such apparent misrepresentations and trial

tactics seem to permeate the proceedings here and elsewhere.

/s/ Frank G. Theis
FRANK G. THEIS

Subscribed and sworn to before me
this 3rd day of July, 1984.

/s/ Helen J. Shepherd
HELEN J. SHEPHERD
Notary Public
State of Kansas

My Appt. Expires July 30, 1986

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Docket No. 211
"All Cases"

IN RE: A. H. ROBINS COMPANY, INC.,
"DALKON SHIELD" IUD
PRODUCTS LIABILITY LITIGATION

MOTION FOR APPOINTMENT OF SPECIAL MASTERS TO SUPERVISE DOCUMENT DISCOVERY; FOR SUPERVISED VIDEOTAPE DEPOSITIONS; AND FOR SANCTIONS AGAINST DEFENDANT ROBINS

COME NOW the plaintiffs by lead and liaison counsel and move the Court for orders as follows:

1. Appointing Peter Thompson and Thomas Bartsh as special masters to supervise the production of all documents set forth in Chief Judge Miles W. Lord's order of February 8, 1984, and this Court's order of May 21, 1984, (Exhibits A and B); providing for all costs and expenses to be paid by defendant; designating Judge Robert G. Renner to determine any issues of privilege which arise during such production in accordance with an existing order in the United States District Court for the District of Minnesota; and ordering that a copy of all documents produced be forwarded to plaintiffs' lead

counsel in Wichita, Kansas, for placement in the MDL-211 document depository.

2. Directing defendant to produce in Wichita, Kansas, for videotape depositions at its expense the following persons: W. Roy Smith; Lester W. Preston, Jr.; E. C. Robins, Jr.; William A. Forrest, Jr.; Patricia Lashley; and such other agents or employees as may be necessary to complete discovery.

3. Ordering defendant to pay as sanctions an amount sufficient to refund all lead and liaison counsel fees previously paid and to pay additional attorney fees, costs, and expenses of plaintiffs' lead and liaison counsel and his designees, pursuant to Rule 37, Fed.R.Civ.P., and 28 U.S.C. § 1927.

4. Striking defendant Robins' affirmative defense of the statute of limitations and prohibiting defendant from presenting evidence in support of such defense, pursuant to Rule 37(b)(2)(B) and (C).

5. Ordering defendant to appear and show cause why it should not be held in contempt of court for withholding and destroying documents, pursuant to Rule 37(b)(2)(D).

Plaintiffs' motion is based on the accompanying memorandum with attached exhibits, the Federal Rules of Civil Procedure, and the orders, depositions, and exhibits filed in this action and those filed in *Bonlender v. Robins*, No. 3-80-341 (D. Minn., July 30, 1984) and *In Re: Dalkon Shield Litigation, Abeln, et al v. Robins*, Hennepin Co. Dist. Ct., Minn.

POST, SYRIOS & BRADSHAW

By /s/ Bradley Post
BRADLEY POST
Lead and Liaison Counsel
for Plaintiffs

NOTICE OF HEARING

The above matter shall come on for hearing before the Honorable Frank G. Theis on January 10, 1985, at 1:00 p.m., or as soon thereafter as the parties may be heard.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing motion was mailed, postage prepaid, to the following on the 13th December, 1984:

Alexander H. Slaughter
McGuire, Woods & Battle
1400 Ross Building
Richmond, Virginia 23219
Lead and Liaison Counsel
for Defendant Robins

/s/ Bradley Post
BRADLEY POST

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Docket No. 211
"All Cases"

IN RE: A. H. ROBINS COMPANY, INC.,
"DALKON SHIELD" IUD
PRODUCTS LIABILITY LITIGATION

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR APPOINTMENT OF SPECIAL MASTERS AND FOR SANCTIONS

All Dalkon Shield cases were ordered consolidated under the above caption by the Judicial Panel on Multidistrict Litigation on December 8, 1975, and were thereafter transferred to Kansas with the consent and subject to the supervision of this Court. After the appointment of lead and liaison counsel for the parties and a series of hearings, this Court issued its order on June 8, 1976, for the production of all documents pertaining in any way to the Dalkon Shield. (Exhibit 1) Thereafter, documents were produced and numerous depositions were taken. This Court issued its orders updating the production of documents on August 19, 1981, and November 29, 1982. (Exhibits 2 and 3) On February 8, 1984, Chief Judge Miles W. Lord of the United States District Court for the District of Minnesota discovered that documents had been withheld and issued his order for production. (Exhibit 4) This Court thereafter issued an order for production of the same documents on May 21, 1984. (Ex-

hibit 5) Some documents have been produced pursuant to said orders. The defendant claims privilege on numerous additional documents. Peter Thompson and Thomas Bartsh have previously been appointed as Special Masters to supervise the production of documents by the United States District Court for the District of Minnesota. Their work is subject to the supervision of the Honorable Robert G. Renner. They are prepared to proceed to review all documents and determine questions of privilege. If disputes arise concerning the privilege issue on any of the documents produced, these will be determined by Judge Renner. This Court should nominate and appoint the same masters to continue supervising the production of documents and Judge Renner to rule on privilege issues. All costs should be assessed against defendant, for reasons hereafter set forth.

Roger L. Tuttle was previously in-house counsel and attorney in charge of litigation for defendant Robins. His employment extended from April, 1971, until April, 1976. His deposition was taken in this litigation on March 7-8, 1977, in Danville, Virginia. This Court designated the Honorable James C. Turk to supervise that deposition. Mr. Tuttle recently gave additional deposition testimony before Magistrate Earl Cudd in the United States District Court for the District of Minnesota. At that time, he testified that following trial of the case of *Deemer v. Robins*, Nos. C-26420 and C-30649, Sedgwick Co. Dist. Ct., Kan., he was instructed to search for sensitive documents and see that they were destroyed. A portion of that testimony is attached as Exhibit 6. Attached to Mr. Tuttle's deposition were a number of documents, some of which were originals which were never produced for inspection and copying in these proceedings, in direct violation of this Court's orders. The exhibits which were never produced included deposition exhibit 10. This is a key document and was clearly covered by orders for production. During the taking of MDL depo-

sition testimony, hundreds of pages of testimony were devoted to the purpose of copper in the Dalkon Shield and whether or not the device was improperly classified as "inert" based on information submitted by Robins to the United States Food and Drug Administration. The document authored by officer W. Roy Smith (Exhibit 7), was crucial to successful discovery on the copper issue and was deliberately and wrongfully withheld. The document was relevant to deposition testimony given by virtually every Robins employee. Mr. Smith gave false and misleading testimony concerning the exhibit.

During consolidated proceedings in Minnesota, a Robins employee, Patricia Lashley, a legal assistant to William A. Forrest, Robins' vice president and general counsel, testified concerning certain notes she took of an important meeting that occurred on February 17, 1975. During the course of the deposition, Ms. Lashley admitted her notes were now missing and no longer available. They were never produced in compliance with the orders for production issued by this Court and have apparently been destroyed.

A motion for sanctions was filed in the case of *Bonlender v. Robins*, et al, *supra*. A hearing was held on that motion before Magistrate Patrick McNulty. Before the issues were decided, all of the cases being handled by the attorneys representing *Bonlender*, et al, were settled for the sum of $38 million. Many of the same issues raised in *Bonlender* are involved in these proceedings. A copy of the motion and brief of plaintiffs are attached as Exhibit 8.

It is necessary and advisable that the additional document discovery ordered in Minnesota go forward. Exhibit 9 was produced as a direct result of the order of Judge Lord. It shows the defendant delegated to the firm of McGuire, Woods & Battle the duty to monitor adverse reactions. The testimony of Dr. Ellen Preston shows that the law firm continued as product monitor at

least until August 22, 1984. (Exhibit 10) Exhibits 9 and 10 make it imperative that the work of the masters proceed. Since defendant's misconduct required the appointment of the masters and it has withheld and destroyed sensitive documents, it should be required to pay all costs of additional document production.

Because defendant wrongfully withheld key documents and delayed recall of the device, it is now necessary to take additional videotaped depositions. Since the necessity for these depositions resulted from wrongful conduct, defendant should be ordered to produce the witnesses in Wichita, Kansas, and pay all costs, attorney fees, and expenses which result.

Additional sanctions should be levied against defendant as requested in plaintiffs' motion.

Respectfully submitted,

POST, SYRIOS & BRADSHAW

By /s/ Bradley Post
BRADLEY POST

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing memorandum was mailed, postage prepaid, to the following on the 13th day of December, 1984.

Alexander H. Slaughter
McGuire, Woods & Battle
1400 Ross Building
Richmond, VA 23219

/s/ Bradley Post
BRADLEY POST

APPENDIX E

UNITED STATES COURT OF APPEALS JUDICIAL COUNCIL FOR THE EIGHTH DISTRICT

IN RE: COMPLAINT OF A. H. ROBINS COMPANY, INCORPORATED
JCP 84-001

IN RE: COMPLAINT OF E. CLAIBORNE ROBINS, JR., *et al.*
JCP 84-002

TRANSCRIPT OF PROCEEDINGS
VOLUME I

A hearing before the Special Investigative Committee of the Judicial Council was hereby commenced at 9:30 o'clock a.m., Monday, July 9, 1984, at the Federal Courthouse, in St. Paul, Minnesota.

[2]
APPEARANCES:

ON BEHALF OF THE COMPLAINANTS

Griffin B. Bell
2500 Trust Company Tower
Atlanta, Georgia 30303

-and-

Charles H. Kirbo

-and-

James D. Miller
1730 Pennsylvania Avenue, NW
Washington, D.C. 20006

ON BEHALF OF THE RESPONDENT

Ramsey Clark
113 University Place
New York, New York 10003

-and-

Joe A. Walters
3800 IDS Tower
Minneapolis, Minnesota

* * * *

[81] MR. BELL: With the court?

MR. WALTERS: With the clerk of courts, yes, here in St. Paul.

MR. BELL: Yeah.

MR. WALTERS: I believe that——

MR. BELL: What case were they filed in?

MR. WALTERS: I believe they were filed in the cases being supervised by Judge Renner.

MR. BELL: Some other case, is that——

MR. WALTERS: Judge Renner's cases. I think you'll find them there.

MR. BELL: Thank you. Now, with relation to Judge Theis.

MR. WALTERS: Yes.

MR. BELL: You've got this affidavit from him, and he's—somebody showed him these Masters' reports?

MR. WALTERS: Yes.

MR. BELL: Did you give us any notice that you were going to contact Judge Theis and let us have someone to respond to these reports?

MR. WALTERS: No, Judge Bell, I did not give any notice that I was in contact with Judge Theis.

MR. BELL: Are you the person who contacted Judge Theis?

MR. WALTERS: Yes, I'm the person who [82] contacted Judge Theis.

MR. BELL: And you showed him these Masters' reports?

MR. WALTERS: I think I sent them down to him.

MR. BELL: And what else did you show him? Did you show him Judge Lord's statements?

MR. WALTERS: My recollection is a copy of the statement.

MR. BELL: But you didn't notify us that you were going that course?

MR. WALTERS: No.

MR. BELL: You didn't consider that going to court, I suppose?

MR. WALTERS: Well, I think that I didn't receive, just like my client never received any notice, Judge Bell, that you were filing a complaint on behalf of your clients with the chief judge of the Eighth Circuit here. We never had an opportunity there to question these arbitrary statements that were made in the complaints, many of which weren't correct, and can't be grounded on facts. This was an ex-parte proceeding that you had with the chief judge of this court, and we weren't given an opportunity to have any contact until after you had made your——

JUDGE SACHS: I think the record has [83] sufficiently been made, counsel.

MR. BELL: Well, I would like to say, Your Honor, I never contacted the chief judge, I have no idea what he's talking about.

MR. WALTERS: Somebody's filed these complaints.

MR. BELL: I filed it by mail.

MR. WALTERS: You never told us you were filing it, you never gave us an opportunity to see it before it was filed, you never gave us an opportunity to correct the statements.

MR. BELL: We filed by the rules of the Eighth Circuit. That's all I can say about that. Let me say just one other thing. (pause) That's enough.

JUDGE LAY: Gentlemen, I'd like to ask one question. It's not clear in my mind. The overlapping, if there

is any, between the appeal that's filed, and I'm fully briefed in our court and the proceedings going on here as it relates to the settlement document, and perhaps the two of you can consult and give us somewhat of a stipulated statement on that this afternoon, but I think that would be helpful to us to understand if there is an overlap. We haven't had a chance to study those briefs. We've just received them, but it does appear there is some connection.

MR. BELL: We'll try to get together on that.

* * * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF KANSAS

Civil Docket Number MDL-211
ALL CASES

IN RE: A. H. ROBINS COMPANY, INC.,
DALKON SHIELD IUD PRODUCTS
LIABILITY LITIGATION

Wichita, Kansas
July 20, 1984

TRANSCRIPT OF STATUS CONFERENCE BEFORE
THE HONORABLE FRANK G. THEIS

APPEARANCES:

FOR THE PLAINTIFFS:

Mr. Bradley Post
Mr. Arden J. Bradshaw
300 North Main
Wichita, Kansas 67202

FOR THE DEFENDANTS:

Mr. Alexander H. Slaughter
Mr. Gilbert Schill
Ms. Cindy Hendren
1400 Ross Building
Richmond, Virginia 23219

Mr. Ronald D. Heck
Post Office Box 1677
Topeka, Kansas 66601

[29] THE COURT: Well, certainly anybody that, I mean, of course, he can't do it by himself—they haven't been operating that way—and I think you would be, ought to have a written designation or telephone designation, something like that that you can rely on that keeps you from having all the plaintiffs' lawyers—like I say, you wouldn't want that because first they're not familiar with the overall aspect of the litigation, like presumably Brad is, and Manchester, and a few of the others—I forget the names of some of yours—

MR. POST: Mr. Bragg, and Mr. Bradshaw, and others.

THE COURT: Yes. But, I think that ought to be done. Well, that is fine with me. I hope you work it out. I'm not looking for trouble, unnecessarily, believe me.

MR. SLAUGHTER: All right. I think—one other aspect about the affidavit, your Honor: I would like to go ahead and, as quickly as we can, move as quickly as Mr. Post always does, to get these things resolved, because the affidavit itself is damaging to us, as the Court knows. You have been handling it for eight or nine years—and we respect the Court and would always look at what the Court ruled, and so therefore the affidavit, you know, here, it appears, although it is not a ruling, and we won't have a ruling for awhile that there were no documents—

THE COURT: No, we can't make any ruling until we're here. If the statements are erroneous, I would like to clear them up.

[30] MR. SLAUGHTER: Thank you, your Honor. That is all.

THE COURT: But, my apprehensions, from reading the—as I said, I read that affidavit, too. It was couched in what I call weasel words, in a way. If you're not sure of something, you qualify about it "it appears to me", and so forth, and it certainly gave a strong appearance to me, and that was my reaction, that somebody had been pulling the wool over my eyes, and, as I said, if I—

I still feel that way—if I found that it had been done willfully, I would feel like some contempt charges ought to be made. Otherwise, I understand that this is a big operation and nothing is perfect. I mean, you can certainly overlook some things by inadvertence, and otherwise.

MR. SLAUGHTER: But, I think if the Court will look—

THE COURT: I never had any reason to doubt your assertions.

MR. SLAUGHTER: Thank you. As I say, I think ultimately, like this thing with the box, it basically was a misunderstanding, it was a box of documents that had in fact been produced, and I think, we know, were in our files in Richmond, and in the court's files, and we will find them here in Wichita because they were important documents that Mr. Post would have picked-out and brought. Since they had those early numbers on them they were obviously in the file at that time.

MR. POST: But, there are—excuse me—there are other documents, as I said, that I've gotten, and they're not,

* * * *